

10/10/07

Amendment

10/790,316

Remarks

There is no amendment to the claims in this document.

This document is a furtherance of argument and case law in support of the Office Action and Response dated 09/30/07 which is responsive to the Office Action dated 05/31/07.

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Applicable Case LawRECEIVED
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KSR International v. Teleflex, Inc. et al., No. 04-1350, 550 U.S. __ (2007). OCT 10 2007

35 U.S.C. 103(a). "The nonobviousness requirement extends the field of unpatentable material beyond that which is known to the public under § 102, to include that which could readily be deduced from publicly available material by a person of ordinary skill in the pertinent field of endeavor." *Bonito Boats*, 489 U.S. at 150 (citing *Graham*, 383 U.S. at 15).

The question of nonobviousness is ultimately one of law, but it turns on "several basic factual inquiries." *Graham*, 383 U.S. at 17. This Court has identified several such inquiries: (1) "the scope and content of the prior art"; (2) "differences between the prior art and the claims at issue"; and (3) "the level of ordinary skill in the pertinent art." *Ibid.* In addition, the Court has stated that "secondary considerations," such as "commercial success" or "long felt but unsolved needs," might provide "indicia of obviousness or nonobviousness." *Id.* at 17-18.

The "ultimate question" of patent validity under Section 103(a) is a question of law. *Graham*, 383 U.S. at 17. It rests on a legal judgment, informed by relevant facts, of whether the hypothetical person having ordinary skill in the art would have found the invention as a whole "obvious." Section 103(a) itself identifies three "central factors relevant to any inquiry into obviousness" (*Johnston*, 425 U.S. at 226): the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the pertinent art. See *Graham*, 383 U.S. at 17. Other "secondary considerations"—including a long-felt and unfulfilled need for the invention, the prior failures of others, and the commercial success of the invention—may also provide "indicia" supporting the legal conclusion of "obviousness or nonobviousness," *id.* at 17-18, 35-36, but those considerations will not render an obvious invention patentable. *Anderson's-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57, 61 (1969) (citing *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 153 (1950)).

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Presentation of Secondary Considerations in 09/30/07 Response and Amendment

As presented by Applicant in the 09/30/07 Response and Amendment to the 05/31/07 Office Action, the instant invention answers a long felt and unresolved need as identified in MPEP 716.04. The instant invention could not be obvious and could not have been obvious at the time of filing the instant invention application due to the long felt and unresolved need for the instant invention. Had the instant invention been obvious at the time of filing the instant application, one of ordinary skill in the art would have begun to practice the instant invention prior to Applicant's filing of the instant application. As there is no such practice and as the long felt and unresolved need still exists today, as identified in the declarations of Mr. Vaughan and Mr. Walker, the instant invention and the instant invention claims are not obvious by 35 U.S.C. 103 (a). Further, this conclusion is a matter of law according to KSR International v. Teleflex, Inc. et al., No. 04-1350, 550 U.S. __ (2007).

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In view of the foregoing, Applicant believes that the claims as presently amended and presented on 09/30/07 are in order for allowance; Applicant respectfully requests allowance of the claims at the earliest opportunity.

Applicant has respectfully presented secondary considerations in the form of two declarations, one from a person of ordinary skill in the art and one from a person of expert skill in the art, both of which demonstrate that the instant invention and the instant invention claims answer a long felt and unresolved need which has been recognized by those of ordinary skill in the art for some time and which was not answered prior to the filing of the instant application. Secondary considerations as a means of traversing a 35 U.S.C. 103 (a) prime facie case of obviousness is directly supported by the most recent U.S. Supreme Court Case Law, e.g. KSR International v. Teleflex, Inc. et al., No. 04-1350, 550 U.S. ___ (2007).

Applicant appreciates the time and effort afforded by the Examiner in the prosecution of the instant claims for the instant invention.

As Applicant has respectfully traversed all of the Examiner's rejections, Applicant herein requests the award certificate for the instant claims as amended and presented on 09/30/07.

Respectfully submitted,



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